(1)

Supreme Court, U.S.
FILED

96 617 OCT 15 1996

No. OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 1996

HYLAND HILL NORTH CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

and

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Intervenor,

vs.

HYLAND HILL CO., et. al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

John R. Dorgan
Counsel of Record
Fredrick R. Krietzman
FROMMELT & EIDE, LTD.
580 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 332-2200

Attorneys for Petitioner

1996 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

94 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the reduction by the Minnesota Supreme Court of the damages that had been awarded to the Petitioner by the jury in this case constitute a violation of the Petitioner's right to a trial by jury as guaranteed by the Seventh Amendment to the United States Constitution?

2. Did the reduction by the Minnesota Supreme Court of the damages that had been awarded to the Petitioner by the jury in this case constitute an unconstitutional taking of property in violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Questions presented for review i

Reports of opinions in this case delivered by courts below 2

Grounds on which jurisdiction of this Court is invoked 2

Constitutional provisions involved 2

Statement of the case 2

Reasons for granting the writ:

I. The reduction by the Minnesota Supreme Court of the damages that had been awarded to the Petitioner by the jury in this case constituted a violation of the Petitioner's right to a trial by jury as guaranteed by the Seventh Amendment to the United States Constitution. 7

II. The reduction by the Minnesota Supreme Court of the damages that had been awarded to the Petitioner by the jury in this case constituted an unconstitutional taking of property in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. 9

Conclusion 11

TABLE OF CONTENTS CONTINUED

Appendix A-1

TABLE OF AUTHORITIES

Cases:

Alvarez v. McDermott,
674 F.2d 1037, 1046 (5th Cir. 1982) 8

Aquachem Co., Inc. v. Olin Corp.,
699 F.2d 516, 520 (11th Cir. 1983) 8

Defender Industries v. Northwestern Mut. Life Ins.,
938 F.2d 502, at 507 (4th Cir. 1991) 10

Geosearch, Inc. v. Howell Petroleum Corp.,
819 F.2d 521 (5th Cir. 1987) 7, 8

Griffen v. Matherne,
471 F.2d 911, 915 (5th Cir. 1973) 9

McKinnon v. City of Berwyn,
750 F.2d 1383 (7th Cir. 1984) 10

McVey v. Phillips Petroleum Co.,
288 F.2d 53, 59 (5th Cir. 1961) 8

P & L Contractors v. American Norit Co.,
5 F.3d 133 (5th Cir. 1993) 8

Pacific Mutual Life Insurance Co. v. Haslip,
499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) . 10

Royal Cup, Inc. v. Jenkins Coffee Service, Inc.,
898 F.2d 1514 (11th Cir. 1990) 8, 9

TABLE OF AUTHORITIES CONTINUED

Silverberg v. Paine, Webber, Jackson & Curtis, Inc.,
710 F.2d 678 (5th Cir. 1983) 9

No. _____

In the
Supreme Court of the United States
October Term, 1996

HYLAND HILL NORTH
CONDOMINIUM ASSOCIATION, INC.
Petitioner,

and

ST. PAUL FIRE AND
MARINE INSURANCE COMPANY,
Intervenor,

v.

HYLAND HILL CO., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Hyland Hill North Condominium Association, Inc., respectfully prays that a writ of certiorari issue to review the decision of the Minnesota Supreme Court entered in this action on June 6, 1996.

REPORTS OF OPINIONS IN THIS CASE DELIVERED BY COURTS BELOW

1. 549 N.W.2d 617 (Minn. 1996).

2. 538 N.W.2d 479 (Minn. App. 1996).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Opinion of the Minnesota Supreme Court was entered on June 6, 1996. The Minnesota Supreme Court denied both sides' Petitions for Rehearing on July 16, 1996. Jurisdiction in this Court is conferred by 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VII....the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined...

Amendment XIV, sec. 1....nor shall any state deprive any person of life, liberty, or property, without due process of law;...

STATEMENT OF THE CASE

This case involves the issue of the obligation of a court to effectuate the intent of a jury in the jury's awarding of damages to a party and the subsequent entry of judgment by the court.

Petitioner, Hyland Hill North Condominium Association, Inc. (the "Association"), sued Respondents, Hyland Hill Co., et. al., for, among other things, construction defects at the Hyland Hill North Condominium located in Bloomington, Minnesota. The Association characterized its construction defect claims as "roof" and "non-roof" claims. The Association alleged claims for breach of the express and implied warranty provisions contained in the Minnesota Uniform Condominium Act (specifically, Minn. Stat. §§ 515A.4-111 and 4-112). The Association also alleged claims of negligence and breach of non-statutory warranties.

Prior to trial the Respondents made a motion for summary judgment, claiming that the Association's claims were time-barred by the two-year statute of limitations contained in Minn. Stat. § 541.051. The trial court denied the summary judgment motion. However, the trial court determined that all of the Association's construction defect claims were subject to the two-year statute of limitations in Minn. Stat. § 541.051, including the Association's Condominium Act breach-of-warranty claims. The trial court also found at that time that the Association had discovered its defects in October 1987, which was more than two years prior to the institution of the lawsuit. However, the trial court found that a question of fact existed as to whether or not the two-year statute of limitations had been tolled, or whether equitable estoppel applied, to block the assertion of the two-year statute by the Respondents.

At the trial the parties stipulated that the amount of the Association's "roof" claim was $350,172.00. The parties also stipulated to a portion of the Association's "non-roof" claim. The Association asked the jury to award it a total of $350,172.00 in connection with the Association's roof claim and $138,278.10 for the Association's non-roof claim.

The questions on the Special Verdict Form pertaining to the Association's construction defect claims were divided into "roof" and "non-roof"-related sections. In the Special Verdict Form the jury awarded the Association the following "roof" and "non-roof" damages:

Roof Defects

Special Verdict Form Question Number	Claim	Amount
4.	Negligence	$200,000.00
6.	Breach of Statutory Express Warranties	$100,000.00
8.	Breach of Statutory Implied Warranties	$ 49,000.00
10.	Other Implied Warranties	$ 1,172.00

Non-Roof Defects

Special Verdict Form Question Number	Claim	Amount
14.	Negligence	$100,000.00
16.	Breach of Statutory Express Warranties	$ 19,287.00
18.	Breach of Statutory Implied Warranties	$ 18,000.00
20.	Other Implied Warranties	$ 1,000.00

The total of the "roof" damages that the jury awarded to the Association was exactly $350,172.00, which was the amount of the Association's roof claim that had been stipulated to by the parties and the amount the Association had requested the jury to award. The amount of the "non-roof" damages awarded by the jury was $138,287.00, almost exactly equal to the $138,278.10 that had been requested by the Association.

The jury also found that the two-year statute of limitations had not been tolled and that equitable estoppel did not apply. Thus, the trial court ordered judgment only in the amount of damages awarded to the Association on its breach of fiduciary duty claims, which were unrelated to the construction defect claims.

The Minnesota Court of Appeals reversed the trial court judgment and found that the six-year limitations period in Minn. Stat. § 515A.4-114 superseded the two-year limitations period in Minn. Stat. § 541.051. The Court of Appeals found that the clear intent of the jury was to award the Association the damages the Association had requested pertaining to the roof and non-roof defects. The Court of Appeals concluded that since the evidence supported the damage awards, and since the damages could have been awarded under a breach of statutory warranty theory, the Association was entitled to the entire amount of construction defect damages that had been awarded by the jury.

The Minnesota Supreme Court partially reversed the Minnesota Court of Appeals' decision and held that the two-year statute of limitations contained in Minn. Stat. § 541.051 applied to the Association's non-Condominium Act defect claims. The Supreme Court held that since the two-year statute of limitations barred those claims, the Association was entitled only to those amounts the jury had awarded for the Association's Condominium Act breach-of-warranty claims. The Supreme Court thereby reduced the Association's damages by approximately $300,000.00 and ordered that judgment be entered for the reduced amount.

The Minnesota Supreme Court recognized the similarity between the damages that had been requested by the Association and the sums of the damages that had been awarded by the jury. However, the Supreme Court stated that the intent of the jury had no bearing on the matter.

The Minnesota Supreme Court denied the Association's petition for rehearing on July 16, 1996.

REASONS FOR GRANTING THE WRIT

I. THE MINNESOTA SUPREME COURT'S REDUCTION IN THE DAMAGES THAT HAD BEEN AWARDED BY THE JURY IN THIS CASE VIOLATED THE PETITIONER'S SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY.

It is clear that the intent of the jury in this case was to award the Association exactly the amount of damages it had requested for its roof and non-roof defects. It is also clear from the Special Verdict Form that the jury understood that its damage findings would be added together and that the Association would receive those sums. The Association believes that the Minnesota Supreme Court's refusal to recognize the jury's clear intent and to award the Association the total amount of construction defect damages determined by the jury violated the Association's constitutional right to a trial by jury.

The Minnesota Supreme Court's position that the jury's intent had no bearing on the actual outcome of the case is contrary to the law and the Constitution. In determining the construction of special verdict forms, other courts have looked to the intent of the juries involved in deciding the amounts of judgments to be entered. In *Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521 (5th Cir. 1987), for example, the Fifth Circuit Court of Appeals affirmed the District Court's refusal to reduce a damage award where it was clear that the jury had already

deducted the percentage of the Plaintiff's negligence from the damage award. In refusing to reduce the award any further, the trial court had recognized that the jury had already applied the deduction, even though the jury had not been instructed to do so. 819 F.2d, at 527. The Court of Appeals affirmed, recognizing that "[a] federal district court has latitude to handle special verdicts so as to give effect to the jury's intentions." *Id.* The Court of Appeals also noted that in similar cases courts had recognized the intent of the jury in determining a judgment amount. For example, the Court noted that in *Alvarez v. McDermott*, 674 F.2d 1037, 1046 (5th Cir. 1982), the jury had found the plaintiff 90 percent negligent and had fixed his damages at exactly 10 percent of the stipulated amount. The trial court had refused to reduce the amount further, noting that the instructions had been ambiguous. The Fifth Circuit Court of Appeals affirmed that decision. *Id.*, at 528.

In *Geosearch*, the Court of Appeals noted that other circuits also followed the practice of giving effect to a jury's intentions. The court cited *Aquachem Co., Inc. v. Olin Corp.*, 699 F.2d 516, 520 (11th Cir. 1983), in which the Eleventh Circuit Court of Appeals had held that a district court could amend the Special Verdict to express the jury's obvious intent in the allocation of damages. *Id.*

In another Fifth Circuit case, *P & L Contractors v. American Norit Co.*, 5 F.3d 133 (5th Cir. 1993), the Court of Appeals noted that it was the obligation of the trial court to give effect to a jury's intentions, in light of the surrounding circumstances of the case. 5 F.3d, at 138 (citing *McVey v. Phillips Petroleum Co.*, 288 F.2d 53, 59 (5th Cir. 1961)). Similarly, in the Eleventh Circuit case of *Royal Cup, Inc. v. Jenkins Coffee Service, Inc.*, 898 F.2d

1514 (11th Cir. 1990), the Court of Appeals had noted that in the interpretation of a jury verdict, the court should consider the case in its entirety and not only look at the individual answers to the Special Verdict Form questions given by the jury. 898 F.2d at 1522. In *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678 (5th Cir. 1983), the Court of Appeals noted that if the jury's intent was clear, the court must adopt that view and enter judgment accordingly. 710 F.2d, at 685 (citing *Griffen v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973)).

In *Silverberg*, the court applied a commonsensical interpretation of the various verdict forms returned by the jury and determined that it was the jury's clear intent to find for the plaintiff on all eight counts of the Complaint. 710 F.2d, at 685. The Association believes that the Minnesota Supreme Court's $300,000.00 reduction of the jury's damages here not only failed to exhibit a "commonsensical" view of the jury's intent, but also simply contradicted the clear intent of the jury and thereby violated the Association's Seventh Amendment rights.

II. THE REDUCTION BY THE MINNESOTA SUPREME COURT OF THE DAMAGES THAT HAD BEEN AWARDED TO THE PETITIONER BY THE JURY IN THIS CASE CONSTITUTED AN UNCONSTITUTIONAL TAKING OF PROPERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Many cases involving reductions by judges in damage awards have involved the remittitur of punitive damages. Appellate scrutiny of those reductions has usually involved a Seventh Amendment analysis, and the plaintiff has generally been given the option of accepting the remittitur or of having a new trial on the issue. *See, e.g., McKinnon v. City of Berwyn*, 750 F.2d 1383, at 1391-92 (7th Cir. 1984); *Defender Industries v. Northwestern Mut. Life Ins.*, 938 F.2d 502, at 507 (4th Cir. 1991). However, the Association believes that the Minnesota Supreme Court's $300,000.00 reduction in the Association's actual damages here can also be scrutinized as an improper taking of the Association's property, in violation of the due process clause of the Fourteenth Amendment.

By reducing the jury's damage award here by $300,000.00, the Minnesota Supreme Court "took" the Association's property without any compensation and without any opportunity for the Association to regain that property. The Association is not necessarily seeking a new trial on damages, since the jury's damage award was clear. However, the Association has been deprived of its right to recover those damages.

The Court has previously recognized that due process considerations applied in a court's review of a punitive damage award. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The Association believes that a similar argument for due process considerations exist when a court reduces a jury's damage award in contravention of the jury's clear intent.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that the Court grant a Writ of Certiorari.

Respectfully submitted,

John R. Dorgan
Counsel of Record
580 International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 332-2200

Dated: October 15, 1996

INDEX TO APPENDIX

Opinion of the Supreme Court of the State of Minnesota A-1

Opinion of the Court of Appeals of the State of Minnesota A-18

Amended Findings of Fact, Conclusions of Law and Order for Judgment in the Fourth Judicial District Court of the State of Minnesota A-34

Order Denying Petition for Rehearing of the Supreme Court of the State of Minnesota A-48

Petition for Rehearing of Hyland Hill North Condominium Association, Inc. A-49

Jury's Special Verdict in the Fourth Judicial District Court of the State of Minnesota A-63

Excerpts from the Trial Court's Charge to the Jury A-72

Excerpts from the Closing Argument of Petitioner's Counsel A-74

STATE OF MINNESOTA

IN SUPREME COURT

C7-94-2564
C8-94-2573

Court of Appeals Tomljanovich, J.

Hyland Hill North Condominium Association, Inc.,

Respondent,

and

St. Paul Fire and Marine Insurance Company,

Intervenor, Filed: June 6, 1996
Office of Appellate Courts

vs.

Hyland Hill Co., et al., petitioners,

Appellants.

SYLLABUS

1. In a case involving defects in construction of a condominium, the condominium association's claims for roof defects involving negligence and breach of warranties not contained in Minn. Stat. §§ 515A.4-111 & 112 (1994), the

Uniform Condominium Act, are barred by the two-year statute of limitations in Minn. Stat. § 541.051 (1994).

2. The six-year statute of limitations under Minn. Stat. § 515A.4-114 (1994) applies to claims involving breach of warranties under the Uniform Condominium Act.

3. With respect to common elements of a condominium, and regarding warranties not covered by section 515A.4-114(c), the six-year statute of limitations cannot begin to run until the condominium declaration has been filed.

4. The court of appeals erred in consolidating under the single breach of Uniform Condominium Act warranties theory the jury's damages verdict for claims involving negligence and breach of non-Uniform Condominium Act warranties.

Affirmed in part and reversed in part.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

This case involves claims of defective workmanship in the construction of Hyland Hill North Condominium (the Condominium). The respondent Hyland Hill North Condominium Association (the Association) originally sued seven defendants. After a number of defendants were dismissed and others added, only six defendants remain as appellants in this case. These parties are Hyland Hill Co., Gittleman Corp., Diversified Management Co., Gittleman Management Corp., Melvin C. Gittleman, and Donald W. Anderson (collectively, the "Developer").[1] The Association

[1] St. Paul Fire and Marine Insurance Company (St. Paul) was the insurance carrier for one of the unit owners in the Condominium. St. Paul paid the claim of $10,000 to that unit owner for repair of water

claimed the Developer was negligent; breached fiduciary duties; breached implied warranties under Minn. Stat. § 515A.4-111 (1992), the Uniform Condominium Act (UCA), and Minn. Stat. § 327A.02, subd. 1 (1992); and breached express warranties under the UCA. Though the Association also originally named Berwald Roofing (Berwald) as a defendant, the claims were later dismissed. However, the Developer filed a crossclaim against Berwald; thus, it remains a party.

In an order denying partial summary judgment dated June 29, 1993, the Hennepin County District Court found that the Association's claims, except for breach of fiduciary duties, were barred by the two-year statute of limitations, Minn. Stat. § 541.051 (1992). The court also found, however, that a fact issue existed as to whether the statute had been tolled or should be disregarded on grounds of estoppel.

A jury trial was held May 4 through May 17, 1994. The jury entered a special verdict finding no grounds for tolling the statute of limitations, or for estoppel. This verdict served to bar all the Association's claims except those for breach of fiduciary duties. Judgment was entered on the latter claims in the amount of $20,010.64. The crossclaim against Berwald was also found to be barred by the statute of limitations.

---

damage. On September 18, 1992, St. Paul intervened for subrogation against the responsible defendant. Subsequently, however, St. Paul was dismissed from the case. In an amended complaint, The James Michael Seed Trust and The John Charles Seed Trust (the Trusts) were named as additional defendants. They, too, were subsequently dismissed from the case.

The Association moved, in the court of appeals, to amend the caption of the case to reflect the fact that none of these parties were involved in the case any longer. However, because St. Paul and the Trusts were part of the caption when judgment was entered in district court, the court of appeals held that they were properly included in the caption.

Both the Association and the Developer appealed and the court of appeals consolidated the separate appeals. The court affirmed the district court in part and reversed in part. *See Hyland Hill North Condominium Assoc. v. Hyland Hill Co.*, 538 N.W.2d 479 (Minn. App. 1995). Both sides petitioned for review to this court. By order dated November 30, 1995, we granted review of the Developer's petition and denied the Association's petition.

Hyland Hill North is a condominium building in Bloomington, Minnesota. It was constructed in 1983 and 1984. The building was substantially completed by September 1984 and a certificate of occupancy was issued. The Condominium has three separate wings, each wing having three floors, all covered by the "main roof." There is also a separate roof covering a "party room" and pool area. The building's first residents, Marilyn and Robert Moore, signed a purchase agreement in February 1984, and moved into their unit in September 1984. The Condominium's declaration was filed in January 1985. Though the unit owners of the Condominium did not initially have control of the condominium association, they assumed control in May 1987.

Upon moving in, the Moores discovered leakage in their unit. In deposition testimony, Mrs. Moore stated that there had been water damage 'since the first rain when we moved in.' Thereafter, the unit "always had leaks." A second resident who moved in in 1985 recalled leakage since "the early time I was living there." At trial there was testimony that in May 1987, the Board of Directors of the Association was aware of skylight leakage on the third floor of the Condominium. Minutes of a special meeting of the Association's members show that on October 6, 1987, the Association was aware of leaks in the party room and garage.[2] In an order denying

[2] There was trial testimony that the leaks in the party room were due to wall problems, not roof problems. Further, as noted above, the roof

partial summary judgment, dated June 29, 1993, the district court found that for purposes of the running of the two-year statute of limitations under section 541.051, the Association was aware of its leakage problems on or before October 6, 1987.

However, Joseph Kuzniar, who had been a member of the Board of Directors of the Association (the Board) since 1987, testified that until September 1989, the Association was only aware of leaks over the party room and skylight leaks. Kuzniar testified that in 1989, there was a "deluge where the water came from the third floor unit down into the second floor unit and came out the electrical outlets and so on." He stated that this was the first time the Association was aware of a "serious leak" in the roof. There was additional testimony that in March 1990, it was discovered there were approximately 80 leaks in third floor units.

After the "deluge" of leaks developed in 1989, the Association hired a roofing inspection firm called Inspec to assess the condition of the roof. Inspec examined the roof in October 1989. The Association received Inspec's report in December. Though Inspec found the overall appearance of the roof to be "fair" for its age, it urged the Association to undertake immediate repairs.

The following spring, Inspec, performed an infrared scan of the building's roof. The test showed that some 10 percent to 15 percent of the roof's insulation was wet. Inspec then changed its earlier position that repair of the roof would be sufficient, and recommended that the roof be replaced. An Inspec representative gave the Association a "worst case" estimate of $200,000 to replace the roof. At an Association meeting on May 8, 1990, based on the $200,000 estimate, the

---

over the party room and pool was separate from the main roof over the units.

members approved a special assessment to replace the roof.[3] During the summer of 1990, the old roof was torn off and a new one installed.

The Association also experienced "nonroof" difficulties with the Condominium building. There was testimony that during and after 1991, leakage occurred in the windows of three-season porches in the Condominium. There was also testimony that in October 1992, wood beams around sundecks at the Condominium were found to be rotted. Repairs were made to both the three-season porch windows and the rotted wood beams. There was also expert testimony that the building did not have appropriate expansion joints, which allow the brick facade to "freely breathe," and that brick was cracking off the building.

The Association filed this action in November 1990, asserting claims for negligence, breach of warranties, and breach of fiduciary duties. The Association brought a motion for summary judgment. The district court denied the motion, but in an order dated June 19, 1993, found: the Association's claims (except the claim for breach of fiduciary duties) were governed by the two-year statute of limitations in section 541.051; the Association discovered its injury by October 6, 1987; and factual issues existed as to whether the two-year period was tolled by assurances from the Developer, and whether the Developer should be estopped to raise the statute of limitations.

The case was tried before a jury in May and June 1994. By special verdict, the jury found: Berwald and the Developer were negligent; the Developer breached implied and express warranties to the Association under the UCA; and the Developer breached other implied warranties under Minn. Stat. § 327A.02 (1992). Negligence was apportioned among all defendants. The jury awarded separate damages for roof

[3] Later, however, the low bid came in at approximately $350,000.

and nonroof related defects. The jury also awarded separate damages for negligence, breach of UCA warranties, breach of non-UCA warranties, and breach of fiduciary duties. Finally, the Developer was found to have made no "promises, inducements, representations or concealments" concerning defects in the building. Thus, there were no grounds for estoppel or tolling of the statute of limitations.

Because the jury found no estoppel or tolling, pursuant to the district court's order of June 29, 1993, the Association was barred from collecting any damages for negligence or for breach of warranties. For the same reason, the Developer was also barred from collecting damages from Berwald. The only damages awarded by the district court were for the Association's claims of breach of fiduciary duty. Upon these claims, the Association was awarded $20,010.64.

The court of appeals affirmed the district court in part and reversed in part. *Hyland Hill,* 538 N.W.2d at 481. It held that the six-year statute of limitations in section 515A.4-114 applied to the breach of warranty claims under the UCA and that the statute of limitations did not begin to run until the declaration for the Condominium was filed. *Id.* at 483. Because the declaration was filed less than six years prior toId the filing of suit, the Association's claims of breach of warranty under the UCA were not barred. *Id.* The court of appeals also held that even if the two-year statute of limitations in section 541.051 applied, the Association's claims for roof defects would not be barred because such actions did not accrue until the Association discovered that the roof needed replacement when Inspec reported to them in May 1990. *Id.* at 484. That is, the court held that the Association's knowledge of claims for repair did not trigger the statute of limitations for a claim of replacement. The Developer appeals the decision of the court of appeals.

The Developer first points out that the two-year statute of limitations under section 541.051 applies to the Association's

defective construction claims that do not arise under the UCA. These claims involve negligence and breach of non-UCA warranties. While it is not disputed that the two-year statute of limitations applies to these claims, the date the statute of limitations began to run is disputed.

The jury awarded damages for both roof and nonroof defects. We first address the date the two-year statute of limitations began to run for roof-related defects.

Section 541.051, subd. 1 provides:

> (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, * * * arising out of the defective and unsafe condition of an improvement to real property, * * * shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury * * *.
>
> * * * *
>
> (b) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury * * *.

It is clear that under this section the statute of limitations began running upon the Association's discovery of defects in the Condominium's roof.

In an order denying summary judgment dated June 29, 1993, the district court found that "the Association was aware of the problems with the roof no later than October 6, 1987, as evidenced in the minutes of a Special Meeting called by the Association and held on October 6, 1987." The minutes of

this special meeting reveal that there was discussion of water leaks in the garage and party room. In an order dated March 22, 1994, the district court declined to reconsider its order of June 29, 1993. When judgment was finally entered on August 2, 1994, the district court found that the two-year statute of limitations under section 541.051 began running on or about October 6, 1987.

The Association argues, however, that it was not aware of its injury until the "deluge" of leaks occurred in the fall of 1989. Also, the court of appeals held that while the Association may have been aware of the need for repair of the roof on or before October 6, 1987, it was not aware of the need to replace the roof until Inspec informed the Association in May 1990 that such action would be necessary.

The district court's findings of fact "shall not be set aside unless clearly erroneous * * *." Minn. R. Civ. Proc. 52.01. There was both trial and deposition testimony that leakage was occurring in the Condominium as early as 1985. The meeting minutes referred to in the district court's order of June 29, 1993, clearly demonstrate that the Association was aware of leakage as early as October 6, 1987. Further, section 541.051 provides that "a cause of action accrues upon discovery of the injury." We view repair and replacement of a roof as different remedies for the same injury, namely, defective construction. Thus, we find that the district court was not clearly erroneous in finding that the Association was aware of its injury by October 6, 1987, and that this was the date the two-year statute of limitations under section 541.051 began to run for roof-related defects. Therefore, we hold that the Association's claims for roof defects involving negligence and breach of non-UCA warranties are barred by the two-year statute of limitations in section 541.05 1.

The court of appeals, however, distinguished between roof defects and defects in masonry facade, three season patios, and sundecks. It labeled the latter defects "nonroof"

defects. The court then held that the district court "abused its discretion in failing to make [a] distinction [between roof and nonroof defects] for purposes of establishing a discovery date." *Hyland Hill*, 538 N.W.2d at 485.

We disagree. To draw a line between roof, masonry, patio or sundeck defects strikes us as arbitrary. The Association has cited no law, nor are we aware of any, which would require the district court to distinguish between these different types of construction defects. While it would not have been unreasonable to distinguish between the different types of defects involved in this case, we do not think that the district court abused its discretion in not doing so. Thus, for purposes of establishing a discovery date, we hold that the district court did not abuse its discretion in not distinguishing between roof and nonroof defects.

Having so held, we now conclude that the trial court was correct in establishing October 6, 1987, as the date upon which the two-year statute of limitations under section 541.051 began to run. This statute of limitations applies to the Association's claims involving negligence and breach of non-UCA warranties. The Association did not file suit until November 1990. Thus, we hold that the Association's roof and nonroof defect claims involving negligence and breach of non-UCA warranties are barred by the two-year statute of limitations in section 541.051.

The Developer next argues that section 541.051 also applies to the Association's breach of warranty claims under the UCA. However, the Association maintains, and the court of appeals held, that the six-year statute of limitations under section 515A.4-114 applies to the Association's claims of breach of warranty under the UCA. We agree with the Association and the court of appeals. Section 515A.4-114 states:

> (a) A judicial proceeding for breach of any obligation arising under section 515A.4111 or

515A.4-112 must be commenced within six years after the cause of action accrues * * *.

(b) Subject to subsection (c), a cause of action under section 515A.4-111 or 515A.4112, regardless of the purchaser's lack of knowledge of the breach, accrues:

* * *

(2) as to each common element, the later of (i) the time the common element is completed (ii) the time the first unit in the condominium is conveyed to a bona fide purchaser * * *.

(c) If a warranty under section 515A.4-111 or 515A.4-112 explicitly extends to future performance or duration of any improvement or component of the condominium, the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

Id. Under Minn. Stat. § 645.26, subd. 1 (1994), if two statutory provisions conflict, then the more specific controls over the more general. *Id.* The Developer contends that section 541.051 conflicts with section 515A.4-114 with regard to warranties under the UCA. The Developer then argues that because section 541.051 is more specific than section 515A.4-114, it should control.

We, however, fail to see the conflict between the two sections and, thus, find no reason to engage in statutory construction. In *Greenbriar Village Condominium Two v. Keller Inv. Inc., 409* N.W.2d 519 (Minn. App. 1987), the court of appeals applied section 541.051 to breach of warranty

claims involving construction defects in a condominium. However, it was not clear in that case that there was a claim that section 515A.4-114 applied or even that the warranties claimed to have been breached were those found in the UCA. Further, this court has never held section 541.051 applicable to claims involving breach of UCA warranties. Finally, section 515A.4-114 clearly states that "[a] judicial proceeding for breach of any obligation arising under section 515A.4-111 or 515A.4-112 must be commenced within six years after the cause of action accrues * * *." Thus, while we find that section 541.051 applies to the Association's claims involving negligence and breach of non-UCA warranties, we find no conflict in applying the six-year statute of limitations under section 515A.4-114 to the claims involving breach of warranties under sections 515A.4-111 and 515A.4-112.

Having decided that the six-year statute of limitations under section 515A.4-114 applies to the Association's claims involving breach of UCA warranties, we must now determine when this statute of limitations began to run on those claims. Under section 515A.4-114, the triggering event for the running of the statute of limitations depends upon whether the warranty breached "explicitly extends to future performance or duration of any improvement or component of the condominium." However, neither the jury instructions nor the special verdict in this case specified precisely which express and implied UCA warranties were breached.[4] Fortunately, this

---

[4] However, the jury instruction covered only section 515A.4-111 (1) & (2) and section 515A.4112(b)(1) & (2). Section 515A.4-111(a)(1) & (2) provides:

> (a) Express warranties made by a declarant or an affiliate of a declarant to a purchaser of a unit if reasonably relied upon by the purchaser, are created as follows:
>
> (1) any affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, area improvements

distinction is not necessary because we find that regardless of the nature of the warranties breached, the Association filed its suit within the six-year statute of limitations.

We turn first to warranties not falling under part (c) of section 515A.4-114, that is, warranties not "explicitly extending to future performance or duration of any improvement or component of the condominium." Section 515A.4-114(b)(2) provides that if a breach is not of such a warranty and involves a common element such as a roof or

---

> to the condominium that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the condominium, creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;
>
> (2) any model or description of the physical characteristics of the condominium, including plans and specifications of or for improvements, creates an express warranty that the condominium will conform to the model or description. A notice prominently displayed on a model or description shall prevent a purchaser from reasonably relying upon the model or description to the extent of the disclaimer set forth on the notice

Section 515A.4-112(b)(1) & (2) provides:

> (b) A declarant warrants to a purchaser that a unit and the common elements in the condominium are structurally suitable for the ordinary uses of real estate of its type and that any improvements or repairs made or contracted for by the declarant or made by any person in contemplation of the creation of the condominium, will be:
>
> (1) free from defective materials; and
>
> (2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

exterior wall, a cause of action does not accrue until "the later of (i) the time the common element is completed (ii) the time the first unit in the condominium is conveyed to a bona fide purchaser." *Id.* The court of appeals held that, under this section, the six-year statute of limitations could not begin to run until the declaration for the condominium had been filed. *Hyland Hill*, 538 N.W.2d at 483. Regarding warranties not falling under part (c) of section 515A.4-114, we agree.

Under Minn. Stat. § 515A.2-101(a), a condominium cannot be created until a declaration is filed. *Id.* Also, under Minn. Stat. § 515A.1-103(19), "'unit' means a portion of the condominium." Thus, the court of appeals concluded that no unit could be conveyed until the declaration was filed. *Hyland Hill*, 528 N.W.2d at 483. Hence, under section 515A.4-114(b)(2), the statute of limitations could not begin to run until the declaration was filed.

The Developer, however, points out that the express and implied warranties provided for in the UCA can be created before the creation of the condominium.[5] Thus, it is argued, the statute of limitations should be able to start running before the creation of the condominium. This argument, however, conflates the creation of a warranty with the accrual of a cause of action for breach of that warranty.

We find the court of appeals' conclusion persuasive; it simply makes no sense to say a 'unit' has been conveyed before the "unit" exists under the statutory definition. Thus, with respect to common elements, and regarding warranties not covered by section 515A.4-114(c), we hold that the six-year statute of limitations cannot begin to run until the condominium declaration has been filed. Because the

---

[5] For example, section 515A.4-111(1) provides that "any affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, * * * creates an express warranty that the unit and related rights and uses will *conform* to the affirmation or promise." *Id.* (emphasis added).

declaration was filed in January of 1985, and the present action was commenced in November of 1990, we hold that the Association's claims for breach of warranties under section 515A.4-114(b)(2) are not barred by the six-year statute of limitation.

The above reasoning applies if the warranty breached did not "explicitly extend[] to future performance or duration of any improvement or component of the condominium." Minn. Stat. § 515A.4-114(c). However, if a warranty does so extend, section 515A.4-114(c) provides that a cause of action accrues upon discovery of the breach rather than the latter of the completion of the common element or first conveyance of a unit. *Id.* Still, we see no reason in this case why the Association's discovery of its injury should not be contemporaneous with its discovery of the breach of UCA warranties. Thus, we conclude that the Association discovered the Developer's breach of UCA warranties no later than October 6, 1987. Therefore, whether the warranties breached were those that "extended to future performance or duration of any improvement or component of the condominium" or otherwise, the UCA warranties claims are not barred by the six-year statute of limitations.

Finally, the Developer contends that the court of appeals erred in consolidating under the single breach of UCA warranty claim the jury's damages verdict for all the different theories of recovery. In its special verdict, the jury awarded four separate damage figures for the roof: $200,000 for negligence; $100,000 for breach of express warranty under the Uniform Condominium Act; $49,000 for breach of implied warranty under the Uniform Condominium Act; and $1,172 for breach of non-UCA implied warranties. With respect to nonroof defects, the jury awarded: $100,000 for negligence; $1,000 for breach of non-UCA implied warranties; $18,000 for breach of UCA implied warranties; and $19,287 for breach of express UCA warranties. The court of appeals

consolidated these awards and deemed them all to be UCA warranty damages. The court stated:

> [W]e have no doubt but that the special verdict form simply left the jury feeling compelled to split up the total damages amongst the three different theories of liability offered.
>
> * * *
>
> It is unnecessary for us to speculate as to why the jury allocated damages in the manner it chose because there is no evidence in the record to suggest that liability under the warranty theory should be less in any respect from liability under all theories combined. We hold, therefore, that the damages awarded for a particular building defect are recoverable in their entirety under breach of warranty.

Hyland Hill, 538 N.W.2d at 486. Indeed, the total amount of roof-related damages claimed by the Association was $350,172. This is exactly equal to the total amount awarded by the jury for roof defects under the various theories of recovery. The Developer now argues that this consolidation of the special verdict awards by the court of appeals was improper.

We agree. The court of appeals decision implies that the jury intended that the Association be awarded the total amount of damages claimed. However, we are unconcerned with what the jury intended the outcome of the case to be. The intent of the jury does not determine the result in a given case. Rather, it is the application of the law to the facts found by a jury that is controlling. It is, therefore, the factual findings of the jury with which we are concerned.

The facts as found by the jury are neither ambiguous nor inconsistent. For breach of roof-related warranties under the

UCA, the jury determined that the Association suffered a total of $149,000 in damages. For breach of nonroof-related warranties under the UCA, the jury determined that the Association suffered a total of $37,287 in damages.[6] As we have held, all the Association's other claims were barred by the two-year statute of limitations under section 541.051. Thus, the damages to which the Association is entitled is the sum of the damages arising from breach of roof and nonroof-related warranties under the UCA together with the $20,010.64 awarded by the district court for breach of fiduciary duties; a total of $206,297.64.

Affirmed in part and reversed in part. Remanded for entry of judgment consistent with this opinion.

---

[6] These amounts equal the sums of the amounts awarded for breach of both express and implied warranties under the UCA.

STATE OF MINNESOTA

IN COURT OF APPEALS

C7-94-2564
C8-94-2573

Hennepin County
Dist. Ct. File 9213104

Davies, Judge

Hyland Hill North Condominium Association, Inc.,

Appellant (C7-94-2564),
Respondent (C8-94-2573),

John R. Dorgan
Fredrick R. Krietzman
Frommelt & Eide, Ltd.
580 International Centre
900 Second Ave. S.
Minneapolis, MN 55402

and

St. Paul Fire and Marine Insurance Company,

Intervenor,

vs.

Hyland Hill Co., et al.,

Respondents (C7-94-2564),
Appellants (C8-94-2573),

Einar E. Hanson
Strobel & Hanson
Goodhue Co. National Bank Bldg.
222 Bush St., Suite 200
Red Wing, MN 55066

John D. Hagen, Jr.
Box 15609
Minneapolis, MN 55415

The James Michael Seed Trust, et al.,

Defendants (C8-94-2573),

and

Berwald Roofing Co., Inc.,

Respondent (C8-94-2573).

John R. Dorgan
Fredrick R. Krietzman

Filed October 3, 1995
Office of Appellate Courts

SYLLABUS

1. The Uniform Condominium Act's six-year statute of limitations applies to breach of warranty claims under the Act.

2. Knowledge of roof leaks reasonably believed to indicate the need for ordinary repair does not constitute discovery of the actual injury where it is later discovered that roof replacement not repair, is necessary.

3. Injuries, though similar in nature, do not necessarily constitute the same injury so as to trigger the running of a statute of limitations.

4. A leaking roof can satisfy the "unsafe condition" requirement of Minn. Stat. § 541.051, subd. 1(a).

Affirmed in part and reversed in part.

Considered and decided by Randall, Presiding Judge, Norton, Judge, and Davies, Judge.

OPINION

DAVIES, Judge

A condominium association sued a condominium developer/declarant (and several associated defendants) for damages based on breach of warranties, breach of fiduciary duties, breach of contract, and negligence, claiming, among other things, construction and design defects. After a jury verdict for the association, the trial court held that a two-year statute of limitations barred the claims against all defendants for defective construction and design. We reverse as to construction and design defects, but affirm the judgment in other respects.

FACTS

Appellant Hyland Hill North Condominium Association, Inc. (Association), is the governing body of Hyland Hill North condominium. The developer and "declarant" of the condominium is respondent Hyland Hill Co.[1] Hyland Hill Co. consists of two partners, Melvin C. Gittleman and Donald W. Anderson. Gittleman and Anderson are also officers and directors of respondent Gittleman Management Corporation, the managing agent for the condominium from October 1985 through August 1990.

Prior to mid-1989, sporadic water leaks occurred in various areas of the condominium's roof. Initially, the Association addressed this problem by relying on Gittleman

[1] The parties have taken cross-appeals. For convenience, we refer to the Association as appellant and all other parties as respondents.

Management Corporation to arrange for roof repairs. But in late 1989, after continual repair efforts proved futile, the Association hired a roof specialist (INSPEC) to investigate. INSPEC first informed the Association that the roof was in need of a $20,000 repair project. Then, in the spring of 1990, after more extensive water leakage, an infrared moisture scan of the roof by INSPEC revealed that it was in much worse condition than previously thought. INSPEC changed its recommendation from mere repair to total roof replacement. The Association replaced the roof in the fall of 1990 at a cost of approximately $350,000, which included the costs incurred investigating the problem. In November 1990, the Association brought this suit against declarant Hyland Hill Co., the Gittleman Management Corporation, Berwald Roofing Co., and others.

At trial of the warranty and other claims, the jury awarded the Association $350,172 for damages resulting from defective construction and design of the roof, $138,287 for defects in masonry facade, patios, and sun decks, $4,802 in maintenance assessments, and $15,000 for reserve account contributions. The trial court, however, ruled that the two-year statute of limitations in Minn. Stat. § 541.051, subd. 1(a), as a matter of law barred all claims of roof and non-roof defects. The trial court rejected the Association's assertion that the applicable statute of limitations was the six-year statute contained in the Uniform Condominium Act, Minn. Stat. § 515A.4-114(a).

The court, granting JNOV, ruled that the two-year statute also barred a cross-claim asserted by Hyland Hill Co. against respondent Berwald Roofing Co., which had built the roof initially. These cross-appeals followed.

ISSUES

I. Which statute of limitations, Minn. Stat. § 541.051, subd. 1(a), or Minn. Stat. § 515A.4-114(a), applies to the

Association's claims for breach of warranties under the Uniform Condominium Act?

II. When did the applicable statute of limitations commence to run?

a. What does the six-year statute provide?

b. For the two-year statute, when was the injury discovered?

III. Was the leaking roof an "unsafe" condition?

IV. Did the trial court err in failing to distinguish between the Association's roof and non-roof injuries?

V. Other issues.

a. How shall the special verdict be interpreted?

b. Were expense assessments recoverable?

c. Were replacement reserve contributions recoverable?

d. May appellant raise new issues?

ANALYSIS

I.

Applicable Statute of Limitations

In 1980, the Minnesota legislature enacted the Uniform Condominium Act, Minn. Stat. ch. 515A. It applies to all condominiums created after August 1, 1980. Minn. Stat. § 515A.1102(b). Sections 515A.4-111 and 515A.4-112 of the Act provide for warranties to purchasers by declarants, including an implied warranty that "a unit and the common elements in the condominium are structurally suitable for the ordinary uses of real estate of its type." Minn. Stat § 515A.4-112(b). The statute of limitations for actions based on this warranty provides:

> A judicial proceeding for breach of any obligation arising under section 515A.4-111 or 515A.4-112 must be commenced within six years after the cause of action accrues * * * .

Minn. Stat. § 515A.4-114(a). Notwithstanding this six-year limitations period and the jury's verdict that Hyland Hill Co. had breached both express and implied warranties under the Act, the trial court granted Berwald Roofing Co.'s motion for JNOV, and concluded that the two-year limitations period under Minn. Stat. § 541.051 also barred the Association's defective design and construction claims.

It is well established that between two statutes, the more specific one prevails. Minn. Stat. § 645.26, subd. 1. The two-year statute addresses damages based on services or construction to improve real property generally. Minn. Stat. § 541.051. The Uniform Condominium Act's six-year limitations period applies explicitly to claims under sections 515A.4-111 and 515A.4-112, the provisions under which the Association brought its claims. Therefore, the six-year statute is more specific to the claims made here and, under Minn. Stat. § 645.26, subd. 1, it applies.

To support application of the two-year statute, Hyland Hill Co. cites ***Greenbrier Village Condominium Two Ass'n v. Keller Inv.***, 409 N.W.2d 519 (Minn. App. 1987). Minnesota's original Condominium Act, Minn. Stat. ch. 515, which was applicable in ***Greenbrier***, does not contain its own statute of limitations. Since the six-year statute of limitations applies only to condominiums created after August 1, 1980, it was not available to trump the two-year statute applied in ***Greenbrier.*** Minn. Stat. § 515A.1-102(b). Thus, ***Greenbrier*** is not relevant on this point and the Uniform Condominium Act's six-year statute of limitations governs the Association's claims for breach of warranties under the Act. (As discussed later, we do find ***Greenbrier*** relevant in other respects.)

II.

Dates the Alternative Statutes of Limitations Began to Run

A. The six-year statute could commence running only after the declaration was recorded.

Hyland Hill Co. argues that the Association's claims are barred even if the Uniform Condominium Act's six-year statute of limitations is applied. Under that statute, breach of warranty actions must be brought within the latter of six years of completion of the common elements or conveyance of the first unit. Minn. Stat. § 515A.4-114(b)(2); ***Chapman Place Ass'n, Inc. v. Prokasky***, 507 N.W.2d 858, 862 (Minn. App. 1993). Hyland Hill Co. contends that the common elements of the condominium were completed and the first units conveyed by September of 1984, more than six years before this action was commenced.

A condominium is not legally created, however, until its declaration is recorded. Minn. Stat. § 515A.2-101(a). Only then does the development become a condominium and only then are the protections of the Uniform Condominium Act triggered. Thus, until a declaration has been recorded, "common areas" cannot be completed nor can a condominium unit be conveyed. Neither triggering event for the running of the Act's statute of limitations can occur before recording of the declaration. To hold otherwise could allow the statute of limitations to run before it is even applicable. Minn. Stat. § 515A.4-102(d) gives direct support to this proposition by requiring that the disclosure statement mandatorily given to unit buyers contain "a copy of the declaration." It follows that a unit cannot be conveyed for purposes of the Uniform Condominium Act until the recorded declaration is available.

Here, the condominium's declaration was not recorded until January 25, 1985. The Association commenced its action in November 1990. Thus, the Association's claims under the Uniform Condominium Act were timely under the Act's six-year statute of limitations.

B. Alternatively, if the two-year statute applies, it commenced to run as to roof claims only when the need for roof replacement became known.

The Association argues that, even if the two-year statute of limitations is applicable, it does not bar the action for roof defects because the injury was first discovered within the two years prior to commencement of the action. Although we could rest our decision as to the Association's claims on the conclusion that the six-year statute applies, we choose to address as well this alternative argument that the roof claim survives even under the two-year statute.

With respect to the two-year statute, this court has held:

> [T]he limitation period in section 541.051, subd. 1, begins to run when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, an injury sufficient to entitle him to maintain a cause of action.

Greenbrier, 409 N.W.2d at 524. But discovery of the first signs of an injury does not necessarily mean that the limitations period has begun to run as to every possible claim.

For example, in ***Lake City Apartments v. Lund-Martin Co.,*** 428 N.W.2d 110 (Minn. App. 1988), ***review denied*** (Minn. Oct. 19, 1988), the plaintiffs did not discover the true nature of their injury (defective plumbing throughout the building) until more than two years after they discovered the initial leaks. This court concluded that discovery of a few

water pipe leaks did not necessarily constitute discovery of the more extensive injury for which the action was brought. ***Id.*** at 112.

This case is similar to ***Lake City Apartments.*** The Association does not contest that it was aware of at least some injury--"sporadic" roof leaks throughout the building--by October 1987. But it argues that not until mid-1989 did it think it necessary or reasonable to take the more costly step of hiring INSPEC, an outside roof specialist, to investigate the problem. And only later still, in May 1990, did the Association learn from INSPEC that, despite the continual repairs made through respondent Gittleman Management Corporation, replacement of the roof was inevitably necessary. The Association, thus, did not discover the true nature of its injury until May 1990, when INSPEC had completed the infrared scan of the roof and made its report.

It would be unsound public policy to impose a stricter rule, requiring a party to investigate all possibilities at the first sign of a problem. The approach of ***Lake City Apartments*** is especially compelling here, where, before commencing its lawsuit, the Association took reasonable steps to remedy the problem in an economically sound and thrifty fashion, making reasonable assumptions of fact rather than spending large sums to guard against possibilities perceived as remote.

This rationale parallels the contract doctrine of mutual mistake, which allows a party to avoid contract liabilities where, at the time of contracting, both parties were mistaken as to a material fact. ***Winter v. Skoglund,*** 404 N.W.2d 786, 793 (Minn. 1987). The mistake doctrine promotes economic efficiency by allowing parties to enter freely into contracts without first going to the prohibitive expense of carefully investigating every fact assumption upon which the agreement is based. Similarly, in this case discovery of a cause of action for ***repair*** based upon sporadic leaks should not preclude, as a matter of law, a later assertion of a cause of action for

replacement of an entire roof system necessary because of previously undiscovered design and construction defects.

Lake City Apartments also held that "[w]hen reasonable minds may differ about the discovery of the injury or condition, the issue is one for the trier of fact". 428 N.W.2d at 112. We conclude, therefore, that the trial court also erred by taking this issue away from the jury and holding that the Association discovered its injury when it first discovered leaks in the party room and garage sometime prior to October 1987.

The trial court thus also erred in using the October 1987 discovery date as a bar to Hyland Hill Co.'s cross-claim against Berwald Roofing Co., Inc., based on breach of its construction contract. Using the proper discovery date, as found by the jury, the cross-claim was timely.[2] The jury verdict is reinstated.[3]

---

[2] The jury also found that Hyland Hill Co. did not toll the two-year statute of limitations. The Association claims this finding is a result of an erroneous instruction. After reviewing the pertinent instruction, we are unpersuaded by the Association's argument that the jury could have wrongfully concluded that it had to find fraudulent concealment in order to find tolling. "It is unnecessary that every possible opportunity for misapprehension (by the jury) be guarded against." ***Seivert v. Bass***, 288 Minn. 457, 467, 181 N.W.2d 888, 894 (1970). There is sufficient evidence in the record to support the jury's finding that the limitations period was not tolled.

[3] In its appeal, Hyland Hill Co. maintains that if the statute of limitations issue is decided adversely to it, it is then entitled to a new trial on damages because the trial court failed to instruct the jury on the doctrine of avoidable consequences. The trial court did instruct the jury as follows:

> The plaintiff's damages for harm to its property should not include any loss which plaintiff could have prevented by reasonable care and diligence.

Hyland Hill Co. argues that the Association could have avoided its damages by accepting Berwald Roofing Co., Inc.'s, offer to repair the

III.

Leaking Roof is Unsafe Condition

The Association also argues (again in the alternative) that the two-year statute of limitations in Minn. Stat. § 541.051, subd. 1(a), does not apply here because the injury does not arise out of a condition that is both "defective and unsafe," as required by the statute.

We agree with the Association that whether a condition is unsafe is a question that turns on the facts of each case. ***Griebel v. Andersen Corp.***, 489 N.W.2d 521, 523 (Minn. 1992). But in ***Griebel***, the Minnesota Supreme Court, holding that "'unsafe' also means 'insecure,'" concluded:

> A window or door which fails to provide the expected barrier against unwanted elements such as ***rain*** or snow or living creatures such as flies or mosquitoes is insecure or unsafe ***whether or not the invader is hazardous to life and limb.***

Id. (emphasis added). We see no reason to treat the leaking roof in this case any different from the windows and doors involved in ***Griebel.*** We hold that the roof was "unsafe" within the meaning of Minn. Stat. § 541.051, subd. 1(a).

IV.

Roof and Non-roof injuries Are Distinguishable

---

roof. But the jury found that the roof was beyond repair. Thus, Hyland Hill Co. could not, in any event, have been prejudiced by the trial court's failure to give the exact instruction requested.

Respondents insist that the Association's non-roof claims (relating to defects in masonry facade, three-season patios, and sun decks) are not sufficiently separate and distinct to constitute an independent cause of action. They argue that, because the Association linked all of its claims to "water leakage," it cannot now claim to have separate injuries for statute of limitations purposes. Respondents appear to suggest that all "water leakage" constitutes the same injury. But, were we to adopt that proposition, it would lead to both absurd and unjust consequences. One can suffer multiple injuries that are unquestionably separate and distinct despite some similarity in their nature.

Respondents again cite ***Greenbrier***, where the plaintiff condominium association argued that knowledge of specific "precast concrete cracks" in particular parts of the building did not trigger the statute of limitations as to other concrete cracks through the rest of the building. 409 N.W.2d at 523. The *Greenbrier* court disagreed:

> Greenbrier urges that these defects differ from those discovered before September 1981 not only in degree, but in kind. * * * We do not find any of the specified defects (or those subsequently cited) sufficiently separate and distinct * * * to create a cause of action in addition to that which arose prior to (their initial cause of action).

Id. We read this to mean that, although the Association here may not claim that each individual leak caused by the defective roof is a separate cause of action, the Association may still have various claims of non-roof water leaks that are sufficiently distinct to constitute causes of action separate from roof claims. We conclude that injuries relating to the masonry facade, the patios, and the sun decks are separate and distinct from the roof. The trial court abused its discretion in

failing to make this distinction for the purpose of establishing a discovery date.

Nonetheless, since the warranty claims on non-roof defects were brought within the six-year limitations period of the Uniform Condominium Act, they were timely. And, as noted in the next section, they cover the full amount of the damages awarded. (But the Association's non-roof claims might have been barred if decided on theories alternative to warranty.)

V.

Other Issues

A. Special Verdict

The trial court provided the jury with a special verdict form that contained several alternative theories under which damages could be awarded. Respondents argue that, in answers to the special verdict form, the damages the jury assigned to negligence on the one hand, and to breach of warranties on the other hand, are duplicative damages for the same injuries. We disagree, for we have no doubt but that the special verdict form simply left the jury feeling compelled to split up the total damages amongst the three different theories of liability offered.

It is unnecessary for us to speculate as to why the jury allocated damages in the manner it chose because there is no evidence in the record to suggest that liability under the warranty theory should be less in any respect from liability under all theories combined. We hold, therefore, that the damages awarded for a particular building defect are recoverable in their entirety under breach of warranty. This places the full liability for all building defects, as found by the jury, outside the bar of the two-year statute of limitations.

B. Expense Assessments

The Association claims the trial court improperly denied its motion for JNOV regarding the claim for "common expense assessments" owed by Hyland Hill Co. for the period before the condominium was turned over to the Association. As the trial court stated, there is evidence in the record from which the jury could have found, as it did, that defendants were liable for only $4,802 in assessments.

> Unless we are able to determine that the evidence is practically conclusive against the verdict, or that reasonable minds could reach but one conclusion against the verdict, the trial court's order denying the motion for judgment notwithstanding the verdict should stand.

Seidel v. Trollhaugen, Inc., 305 Minn. 506, 507, 232 N.W.2d 236, 239 (1975).

The trial court's denial of the Association's JNOV motion as therefore proper, and the award for assessments is affirmed.

C. Replacement Account Obligation

The Association claims that it is entitled to a new trial because it was prejudiced by the trial court's admission into evidence testimony of "common practice" regarding condominium declarants' contribution to replacement reserve accounts. But this testimony was relevant to the jury's determination of whether or not Hyland Hill Co., as the declarant, had any duty to fund such an account. The jury found that such a duty was owed. Thus, even though it may be dissatisfied with the amount awarded, the Association was not prejudiced by this testimony and the trial court's denial of

the Association's motion for a new trial on this claim was proper. Errors of law and irregularity in the proceedings must be prejudicial in order to grant a new trial. ***Danielson v. Hanford,*** 352 N.W.2d 758, 762 (Minn. App. 1984).

There was sufficient testimony supporting the jury finding that $15,000 was the amount owed by Hyland Hill Co. to the replacement reserve account and that award is affirmed.

D. New Arguments by Appellants

The Association maintains that because respondent Gittleman Management Corporation did not take part in "performing or furnishing the design, planning, supervision, materials, or observation of construction of the improvement to real property," the statute of limitations in Minn. Stat. § 541.051 does not apply to the management corporation. Because the Association did not raise this argument at trial, we decline to address it on appeal. ***Thiele v. Stich,*** 425 N.W.2d 580, 582 (Minn. 1988).

The Association also contends that there exists an issue of material fact as to when the Association discovered a breach of warranty provided for in Minn. Stat. § 327A.02, subd. 1(c), and thus when the two-year statute of limitations began to run as to their claim for a "major construction defect." But no such injury was alleged at trial, and the Association does not specify the basis for this claim. We therefore decline to consider this argument. ***Id.***

DECISION

The trial court's decision based on the statute of limitations is reversed in accordance with this opinion. The full amount of damages awarded for roof and non-roof defects is ordered reinstated. The jury's award on Hyland Hill Co.'s crossclaim against Berwald Roofing Co., Inc., is also

reinstated in accordance with this opinion. The awards for common expense assessments and reserve account contributions are affirmed.

Affirmed in part and reversed in part.

s/s
Judge Jack Davies
September 27, 1995

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Hyland Hill North Condominium Association, Inc., a Minnesota non-profit corporation,	
Plaintiff, vs.	**AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT**
Hyland Hill Co., a Minnesota partnership, Gittleman Corporation, a Minnesota corporation, Diversified Management Company, a Minnesota corporation, Gittleman Management Corporation, a Minnesota corporation, Melvin C. Gittleman, individually and Donald W. Anderson, individually,	File No. CT 92-13104
Defendants, and	
Berwald Roofing Co., Inc., a Minnesota corporation,	
Defendant on Cross-claim.	

The above-entitled matter came on for trial by jury before the Honorable Marilyn Brown Rosenbaum on May 4, 1994

through May 17, 1994 and for Post-trial Motions on July 13, 1994.

John R. Dorgan, Esq. and Fredrick R. Krietzman, Esq. appeared on behalf of the Plaintiff Hyland Hill North Condominium Association, Inc. and the Defendant Berwald Roofing Co., Inc.

Charles A. Cox, Sr., Esq. and Charles A. Cox III, Esq. appeared on behalf of the Defendants Hyland Hill Co., Gittleman Corporation, Diversified Management Company, Gittleman Management Corporation, Melvin C. Gittleman, and Donald W. Anderson.

Based upon the jury verdict and based upon the files, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

Prior to submission to the jury, the parties stipulated to the following facts which the Court read into and made part of the record:

1. Defendant Gittleman Management Corporation is the successor corporation to Defendants Gittleman Corporation and Diversified Management Company. Any reference to the Gittleman Management Corporation should be construed as also including Gittleman corporation and Diversified Management Company.

2. As of August 31, 1990, the Association had a balance of $25,080.95 in its reserve fund account.

3. Prior to August 31, 1990, the Association's budget allocated the amount of $6,000 per year for the Association's reserve fund.

4. At the present time, the Association's budget allocates $13,000 per year for the Association's reserve fund.

5. The Association has paid to Bernard L. Dalsin Company ("Dalsin") a total of $317,616 for the following services performed by Dalsin:

> Inspection of original roof structure, tear-off of original roof, and installation of new roof.

6. The Association has paid to Inspec, Inc., a total of $32,556 through October 31, 1991 for the following work:

> Inspection of roof leaks; laboratory analysis of the original roof structure; site inspection; preparation of reports regarding re-roofing progress by Bernard L. Dalsin Company; inspection of re-roofing by Bernard L. Dalsin Company; and preparation of re-roofing materials, including specifications and bidding documents.

7. The Association has paid to Omega Construction a total of $4,904.79 through October 29, 1992 for repairs on the porches at the Condominium.

8. The Association has paid to Dr. Ladislav Cerny a total of $3,567 through December 1992 for his services concerning inspections of the masonry facade and other portions of the Condominium, and generating reports concerning said investigations.

9. The Association has paid to Carciofini Caulking Company a total of $1,718 for repairs performed by Carciofini on patios at the Condominium.

10. The Association has paid to Brin-Northwestern Glass Company a total of $3,309.73 through April 25, 1994, for repairs to patios at the Condominium.

11. The Association has paid to Wilson Services a total of $7,798 through April 25, 1994, for repairs to patios at the Condominium.

12. The Association has paid to VHM Services a total of $1,306.83 for various repairs for water leakage at the Condominium.

The jury answered the questions in the special verdict form as follows:

1. Was the condition of the building's roof beyond repair?

ANSWER: Yes

2. Were any of the following parties negligent with respect to the construction and/or design of the building's roof?

ANSWER:	Hyland Hill Co.	Yes
	Berwald Roofing Co., Inc.	Yes
	Gittleman Management Corporation	Yes

3. If you answered "Yes" as to any party or parties in question no. 2, then with respect to those parties answer the following question: Was the negligence a direct cause of harm to the Association?

ANSWER:	Hyland Hill Co.	Yes
	Berwald Roofing Co., Inc.	Yes

Gittleman Management Corporation Yes

4. If you answered "Yes" as to any party or parties in both question nos. 2 and 3, then answer the following question: What amount of damages was directly caused by the negligence?

ANSWER: $ 200,000

5. Did any of the following parties breach any express warranties under the Minnesota Uniform Condominium Act with respect to roof?

ANSWER:	Hyland Hills Co.	Yes
	Gittleman Management Corporation	Yes
	Melvin C. Gittleman	Yes
	Donald W. Anderson	Yes

6. If you answered "Yes" as to any party or parties in question no. 5, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 100,000

7. Did Hyland Hills Co. breach any implied warranties provided for under the Minnesota Uniform Condominium Act with respect to the roof?

ANSWER: Yes

8. If you answered "Yes" to question no. 7, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 49,000

9. Did Hyland Hill Co. breach any other implied warranties with respect to the building's roof?

ANSWER: Yes

10. If you answered "Yes" to question no. 9, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 1,172

11. If you answered "Yes" as to any party on questions 2 and 3; or 5 and 7; or 7; or 9; then answer this question: Taking the combined negligence of those parties to whom you answered "Yes" as 100%, what percentage thereof do you attribute to:

ANSWER:

Hyland Hill Co.	20%
Gittleman Management Corporation	20%
Melvin C. Gittleman	35%
Donald W. Anderson	5%
Berwald Roofing Co., Inc.	20%
= 100%	

12. Was Hyland Hill Co. negligent with respect to construction or design of portions of the building other than the roof?

ANSWER: Yes

13. If you answered "Yes" to question no. 12, then answer the following question: Was the negligence a direct cause of harm to the Association?

ANSWER: Yes

14. If you answered "Yes" to both question nos. 12 and 13, then answer the following question: What amount of damages was directly caused by the negligence?

ANSWER: $ 100,000

15. Did any of the following parties breach any express warranties provided for under the Minnesota Uniform Condominium Act concerning portions of the building other than the roof?

ANSWER:	Hyland Hill Co.	Yes
	Gittleman Management Corporation	Yes
	Melvin C. Gittleman	Yes
	Donald W. Anderson	Yes

16. If you answered "Yes" as to any party or parties in question no. 15, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 19,287

17. Did Hyland Hill Co. breach any implied warranties provided for under the Minnesota Uniform Condominium Act concerning portions of the building other than the roof?

ANSWER: Yes

18. If you answered "Yes" to question no. 17, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 18,000

19. Did Hyland Hill Co. breach any other implied warranties concerning portions of the building other than the roof?

ANSWER: Yes

20. If you answered "Yes" to question no. 19, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 1,000

21. Did Berwald Roofing Co., Inc. breach a contract with Hyland Hill Co. regarding the construction of the roof?

ANSWER: Yes

22. If you answered "yes" to question no. 21, then answer this question: What amount of damages was directly caused by the breach?

ANSWER: $ 40,000

23. Did any of the following parties breach an obligation to create and fund a reserve account?

ANSWER:	Hyland Hill Co.	Yes
	Gittleman Management Corporation	Yes
	Melvin C. Gittleman	Yes
	Donald W. Anderson	Yes

24. If you answered "yes" as to any party or parties in question no. 23, then answer this question: What amount of damages was directly caused by the breach?

ANSWER: $ 15,000

25. Did any of the following parties breach an obligation regarding payment or collection of maintenance assessments?

ANSWER:	Hyland Hill Co.	Yes
	Gittleman Management Corporation	Yes
	Melvin C. Gittleman	Yes
	Donald W. Anderson	Yes

26. If you answered "Yes" as to any party or parties in question 25, then answer this question: What amount of damages was directly caused by the breach?

ANSWER: $ 4,802

27(a)(i) After October 6, 1987, did any of the defendants, other than Berwald, make any promises, inducements, representations, or concealments to the Association that the defects in the building had been or would be cured?

ANSWER: No

(ii) If you answered "Yes" to question 27(a)(i), then answer the following question: Did the Association rely on such promises, inducements, representations, or concealments in commencing this lawsuit?

ANSWER: No answer given

(iii) If you answered "Yes" to question no. 27(a)(ii), then answer the following question: On what date did such reliance begin?

ANSWER: No answer given

(iv) If you answered "Yes" to question no. 27(a)(iii), then answer the following question: on what date did the Association know, or reasonably should have known that further reliance was unjustifiable?

ANSWER: No answer given

(v) If you answered "Yes" to question no. 27(a)(iv), then answer the following question: Did the Association act with due diligence in bringing this lawsuit after it knew or reasonably should have known that further reliance was unjustifiable?

ANSWER: No answer given

27(b)(i) After October 6, 1987, did any of the defendants, other than Berwald, fraudulently conceal from the Association the existence of defects in the building by representing to the Association that the defendants had cured the defects?

ANSWER: No

(ii) If you answered "Yes" to question no. 27(b)(i), then answer the following question: Did the defendants know at the time the representations

was made that the defects in the building had not in fact been cured?

ANSWER: No answer given

(iii) If you answered "Yes" to question no. 27(b)(i), then answer the following question: on what date did the representations begin?

ANSWER: No answer given

(iv) If you answered "Yes" to question no. 27(b)(i), then answer the following question: On what date did the Association know., or reasonably should have known that the defendants' representations were false?

ANSWER: No answer given

CONCLUSIONS OF LAW

1. The condition of the building's roof was beyond repair.

2. Defendants Hyland Hill Co., Berwald Roofing Co., Inc. and Gittleman Management Corporation were negligent with respect to the construction and/or design of the building's roof.

3. Defendant Hyland Hill Co. was negligent with respect to construction or design of portions of the building other than the roof.

4. Defendants Hyland Hill Co., Gittleman Management Corporation, Melvin C. Gittleman, and Donald W. Anderson breached express warranties under the Minnesota Uniform Condominium Act with respect to the roof.

5. Defendants Hyland Hill Co., Gittleman Management Corporation, Melvin C. Gittleman, and Donald W. Anderson breached express warranties under the Minnesota Uniform Condominium Act with respect to portions of the building other than the roof.

6. Defendant Hyland Hill Co. breached implied warranties under the Minnesota Uniform Condominium Act with respect to the roof.

7. Defendant Hyland Hill Co. breached implied warranties under the Minnesota Uniform Condominium Act with respect to portions of the building other than the roof.

8. Defendant Hyland Hill Co. breached the warranties contained in Minn. Stat. §327A.02, subd. 1 with respect to the roof.

9. Defendant Hyland Hill Co. breached the warranties contained in Minn. Stat. §327A.02, subd. 1 with respect to portions of the building other than the roof.

10. Defendant Berwald Roofing Co. breached it's contract with Hyland Hill Co. regarding construction of the roof.

11. Counts one through seventeen and Count nineteen of Plaintiff's Complaint arose out of the defective and unsafe condition of an improvement to real property, and thus are subject to the two year statute of limitations under Minn. Stat. §541.051. See Judge Crump's Order dated June 29, 1993.

12. Plaintiff knew, or reasonably should have known, by October 6, 1987, that the defects in the building were significant enough to have brought a legal action against the Defendants for the defects. See Judge Crump's Order dated June 29, 1993.

13. Plaintiff served the original Summons and Complaint in this matter on November 26, 1990 upon Defendants Hyland Hill Co., Gittleman Corporation, Melvin C. Gittleman, Donald W. Anderson, and Berwald Roofing Co., Inc.

14. The statute of limitations was not tolled under either the theory of equitable estoppel or promissory estoppel.

15. Therefore, Counts one through seventeen and Count nineteen of Plaintiff's Complaint are barred by the two year statute of limitations under Minn. Stat. §541.051 and Plaintiff is not entitled to recovery under paragraphs one through ten of the above Conclusions of Law.

16. Defendants Hyland Hill Co., Gittleman Management Corporation, Melvin C. Gittleman, and Donald W. Anderson's cross-claim arose out of the defective and unsafe condition of an improvement to real property, and thus is subject to the two year statute of limitations under Minn. Stat. §541.051. See Judge Crump's Order dated June 29, 1993.

17. Defendants knew, or reasonably should have known, by October 6, 1987, that the defects in the roof were significant enough to have brought a legal action against Berwald Roofing, Co. Inc. See Judge Crump's Order dated June 29, 1993.

18. Defendants served their cross-claim upon Berwald Roofing Co., Inc. on December 22, 1992, more than two years after the statute of limitations had run.

19. Therefore, Defendants' cross-claim against Berwald Roofing Co., Inc. is barred by the statute of limitations under Minn. Stat. §541.051 and Defendants are not entitled to recovery against Berwald Roofing Co., Inc.

20. Defendants Hyland Hill Co., Gittleman Management Corporation, Melvin C. Gittleman, and Donald W. Anderson breached their fiduciary duty to create and fund a reserve account.

21. Defendants Hyland Hill Co., Gittleman Management Corporation, Melvin C. Gittleman, and Donald W. Anderson breached their fiduciary duty regarding payment and collection of maintenance assessments.

ORDER FOR JUDGMENT

Plaintiff shall have Judgment against Defendants Hyland Hill Co., Gittleman Management Corporation, Melvin C. Gittleman, and Donald W. Anderson in the amount of $19,802.00, including $15,000.00 for breach of fiduciary duty to create and fund a reserve account and $4,802.00 for their breach of fiduciary duty regarding payment and collection of maintenance assessments.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 2, 1994

BY THE COURT:

s/s
Marilyn Brown Rosenbaum
Judge of District Court

STATE OF MINNESOTA

IN SUPREME COURT

C7-94-2564
C8-94-2573

Hyland Hill North Condominium Association, Inc.,

Respondent,

and

St. Paul Fire and Marine Insurance Company, ORDER

Intervenor,

vs.

Hyland Hill Co., et al., petitioners,

Appellants.

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petitions for rehearing of Hyland Hill Co., et al. and

Hyland Hill North Condominium Association, Inc. are both denied.

IT IS FURTHER ORDERED that attorney fees are not allowed to any party on these petitions.

Dated this 16 day of July, 1996.

BY THE COURT:

s/s
Esther M. Tomljanovich, Associate Justice

STATE OF MINNESOTA

IN SUPREME COURT

Hyland Hill North Condominium Association, Inc.,

Petitioner,

and

St. Paul Fire and Marine Insurance Company,

Intervenor,

Hyland Hill Co., et al,

Respondents.

PETITION FOR REHEARING OF HYLAND HILL NORTH CONDOMINIUM ASSOCIATION, INC.

SUPREME COURT CASE NUMBER: C7-94-2564
C7-94-2573

DATE OF FILING OF SUPREME COURT DECISION: JUNE 6, 1996

TO: The Supreme Court of the State of Minnesota:

The Petitioner, Hyland Hill North Condominium Association, Inc. (the "Association"), respectfully requests a rehearing of this matter, pursuant to Rule 140.01, Minnesota Rules of Civil Appellate Procedure. The Association believes that each of the. standards set forth in said Rule provide a basis to support the granting of this petition.

Issues

1. The Court incorrectly applied the "clearly erroneous" standard to the district court's finding that the two-year statute of limitations began to run on October 7, 1987.
2. The Court incorrectly applied the "abuse of discretion" standard to the district court's finding that the Association suffered only one injury.
3. The standard of review for findings made in connection with a summary judgment motion is whether genuine issues of material fact exist and whether the trial court correctly applied the law.
4. There is sufficient evidence to demonstrate that genuine issues of material fact existed regarding the discovery date of the roof-related injuries.
5. There is sufficient evidence to demonstrate that genuine issues of material fact existed showing the Association suffered separate and distinctly different injuries.
6. The Court is allowed to make its own findings on the above issues, considering all evidence on the record.
7. The Court mis-applied Minn. Stat. § 541.051, Subd. 1, in determining that the discovery of a defect necessarily triggered the two-year statute of limitations. The cause of action does not accrue upon discovery of "defects," or even upon discovery of a "defective and unsafe condition." The statute begins to run upon discovery of a statutory "injury" which arises out of a defective and unsafe condition of an improvement to real property.
8. The application of the Court's opinion to future cases will effectively (i) confuse the issue of when the statute of limitations begins to run for a cause of action brought pursuant to Minn. Stat. 541.051, and

(ii) preclude recovery for subsequent injuries suffered by plaintiffs in defective construction cases.

9. The failure to enforce the jury's unambiguous intent in its damage award to the Association violates the Association's constitutional right to a jury trial under Article 1, Section 4, of the Minnesota Constitution (Amended and Restructured November 5, 1974) and Amendment VII to the United States Constitution.

1. THE COURT INCORRECTLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD TO THE DISTRICT COURT'S FINDING THAT THE TWO-YEAR STATUTE OF LIMITATIONS BEGAN TO RUN ON OCTOBER 7, 1987.

In its opinion the Court applied Rule 52.01, Minnesota Rules of Civil Procedure, to the findings of fact issued in connection with Judge Crump's summary judgment decision:

> The district court's findings of fact 'shall not be set aside unless clearly erroneous * * * Minn. R. Civ. P. 52.01'. * * * We find that the district court was not clearly erroneous in finding that the Association was aware of its injury by October 6, 1987, and that this was the date the two-year statute of limitations under Section 541.051 began to run for roof-related defects.

Supreme Court Opinion at p. 8.

However, the "clearly erroneous" standard under Rule 52.01 does not apply to findings of fact issued in summary judgment proceedings. See, Rathbun v. W.T. Grant Co., 300 Minn. 223, 219 N.W.2d 641 (1974); Firstar Eagan Bank, N.A., v. Marquette Bank Minneapolis, N.A., 466 N.W.2d 8

(Minn.App. 1991). The Court, therefore, erred in applying the "clearly erroneous" standard here.

2. THE COURT INCORRECTLY APPLIED THE "ABUSE OF DISCRETION" STANDARD TO THE DISTRICT COURT'S FINDING THAT THE ASSOCIATION SUFFERED ONLY ONE INJURY.

The Court applied the "abuse of discretion" standard to the district court's finding that there were not separate injuries and held that no abuse of discretion had occurred:

> While it would not have been unreasonable to distinguish between the different types of defects involved in this case, we do not think that the district court abused its discretion in not doing so.

Supreme Court Opinion, at p. 9.

The appellate court is not bound by the district court's findings, but rather its scope of review includes "all of the pleadings, depositions, and admissions on file, together with the affidavits." Firstar Eagan Bank, N.A., v. Marquette Bank Minneapolis, N.A., 466 N.W.2d 8, 11 (Minn.App. 1991).

3. THE STANDARD OF REVIEW FOR FINDINGS RESULTING FROM SUMMARY JUDGMENT IS WHETHER GENUINE ISSUES OF MATERIAL FACT EXIST AND WHETHER THE TRIAL COURT CORRECTLY APPLIED THE LAW.

Rule 52.01, Minnesota Rules of Civil Procedure, does not require the district court to make findings of fact in connection with summary judgment motions and, therefore, the appellate court is not bound by those findings. Firstar Eagan Bank, N.A., v. Marquette Bank Minneapolis, N.A., 466 N.W.2d 8,

11 (Minn.App. 1991). The scope of review in this case is whether a genuine issue of material fact existed as to when the two-year statute began to run and whether the district court erred in its application of the law in deciding the Association had not suffered more than one distinct and separate injury. Id. On summary judgment, the evidence "must be viewed in a light most favorable to the nonmoving party." Johnson v. County of Dakota, 510 N.W.2d 237, 240 (Minn.App. 1994).

Because the district court's summary judgment findings were not appealable, the Association has the right to a review of those findings at this time. Rathbun v. W.T. Grant Co., 300 Minn. 223, 238, 219 N.W.2d 641 (1974). See also, Financial Relations Bd. v. Pawnee Corp., 308 Minn. 109, 240 N.W.2d 565 (1976).

4. THERE IS SUFFICIENT EVIDENCE TO DEMONSTRATE THAT GENUINE ISSUES OF MATERIAL FACT EXISTED REGARDING THE DISCOVERY DATE OF THE ROOF-RELATED INJURIES.

In response to Respondents' summary judgment motion, the Association submitted, among other things, the Affidavit of Edward O. Betker, dated June 1, 1993. In his affidavit, Mr. Betker gave a chronological history of the roof-related problems encountered by the Association. Mr. Betker clearly identified the date when the Association first discovered that the roof needed to be replaced as May 1, 1990. Prior to that date, the Association actively pursued remedies to the various roof-related problems it was encountering. However, it was not until the Inspec company did its infrared test of the roof that the Association realized its injury was not *repair* costs, but rather *total roof replacement.*

Because the roof leakage discussed by the Association in October of 1987 was in the party room, and an inspection of

the party room roof (different from the roof over the units) found no leaks, the Association could not have reasonably discovered its injury - e.g. the need to replace the roof. It was not until 1989 that a deluge of leaks in the third floor units prompted the infrared inspection of the roof which revealed the need to replace the roof.

Clearly Mr. Betker's affidavit raised a question about when the Association discovered its injury, and disputed the district court's finding that the injury was discovered no later than October 7, 1987. Where the evidence is viewed in a light most favorable to the nonmoving party, and reasonable minds may differ about the date of discovery of the injury, the issue is one for the trier of fact. Lake City Apartments v. Lund-Martin Co., 428 N.W.2d 110, 112 (Minn. App. 1988).

5. THERE IS SUFFICIENT EVIDENCE TO DEMONSTRATE THAT GENUINE ISSUES OF MATERIAL FACT EXISTED SHOWING THE ASSOCIATION SUFFERED SEPARATE AND DISTINCTLY DIFFERENT INJURIES.

According to Lake City Apartments, discovery of a *defect* does not necessarily mean that an *injury* has been discovered or that the limitations period has begun to run on every possible action. Id., at 112. This Court agreed that it would not be unreasonable to distinguish between different types of defects. Supreme Court Opinion, p. 9. In Greenbrier Village Condominium Two Ass'n v. Keller Inv., 409 N.W.2d 519 (Minn.App. 1987), the Minnesota Court of Appeals implied that separate causes of action are appropriate where defects in construction are "sufficiently separate and distinct". Id., at 523.

The Affidavit of John R. Dorgan, submitted February 18, 1994, in connection with the Plaintiff's Motion to Reconsider, clearly detailed several separate and distinct injuries suffered

by the Association as a result of defective construction. When the roof replacement project began in 1990, the Association discovered for the first time defects in the construction of the brick masonry around the roof. Also in 1990, the Association discovered, through an inspection and report by Dr. Ladislav Cerny, that there had been a failure to install sufficient expansion joints to protect cracking of the brick and related masonry when the building shifted or upon changes in the weather. In addition, in 1994, the Association began to experience problems with some of the windows at the Condominium. After an inspection by Anderson Windows, the Association discovered that some of the window frames had been installed directly on the masonry, causing the windows to crack during any shifting or contracting of the building.

It is clear from the record, even at the time of the motion for reconsideration, that genuine and material issues of fact existed to support the Association's contention that it suffered separate and distinct injuries as a result of the construction defects at the condominium. It is also clear that the Association could not have reasonably discovered those defects in 1987. In ruling that the Association discovered its single allowable injury in 1987, the Court has effectively precluded the Association from recovering for the defective joint and window installation which it could not have discovered until 1990 and 1994, respectively, or for any other injury. Again, the issue was one for the jury.

6. THE COURT IS ALLOWED TO MAKE ITS OWN FINDINGS ON THE ABOVE ISSUES, CONSIDERING ALL EVIDENCE ON THE RECORD.

In the memorandum accompanying his summary judgment order, Judge Crump effectively granted summary judgment in

favor of the Respondents on all claims deemed to have been brought under Minn. Stat. 541.051, ruling that the statute of limitations had run on any such claims. The district court's findings also held the Association to a single injury, and did not allow the issue of separate injuries to be decided by the jury. Rule 56.04 Minnesota Rules of Civil Procedure, governs cases wherein claims have been partially adjudicated. "The rule requires that a motion for summary judgment be made and that a judgment which does not fully adjudicate a case will trigger consideration under Rule 56.04." Herr and Haydock, 2A Minn. Prac. Rules of Civ. Proc., p. 96.

Furthermore, an appeal of a partial summary judgment entered pursuant to Rule 56.04 such as the current case, is governed by Rule 54.02 Minnesota Rules of Civil Procedure. Financial Relations Bd. v. Pawnee Corp., 308 Minn. 109, 240 N.W.2d 565 (1976). Although the district court improperly issued findings of fact regarding the discovery date of the injury and improperly held the Association to a single injury, despite evidence to the contrary, Rule 54.02 allows the Court to now review all the evidence of record to make a determination regarding, these matters. Rule 54.02 Minnesota Rules of Civil Procedure.

In Pawnee, the Minnesota Supreme Court dismissed the plaintiff's appeal from a partial summary judgment decision dismissing all claims brought based on the alleged written contract. The Court noted that, absent an express determination and direction by the trial court for the entry of judgment, the partial summary judgment decision was not appealable before and until the matter was appealed from a final judgment or order on the matter. Pawnee, 308 Minn. at 110. In its Motion to Reconsider and supporting memorandum, the Petitioner in the case at bar requested an express determination and direction from the Judge Rosenbaum for the entry of judgment. However, the

Petitioner's request was denied. Therefore, according to Rule 54.02 M.R.C.P., and as restated in Pawnee:

> In the absence of such determination and direction, any order or other form of decision, *however designated*, which adjudicates fewer than all the claims *or rights or liabilities* of fewer than all the parties * * * is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Pawnee, 308 Minn. at 111, emphasis added. Also, Rule 54.02 expressly provides that the failure to appeal determinations made pursuant to Rule 56.04 does not forfeit a party's right to raise the issues determined by the partial summary judgment motion for review at a later time.

Therefore, not only does the Association have the right to have Judge Crump's findings reviewed by this Court, the Association also has a right to a determination of those issues based on the merits and the *entire* record.

7. THE COURT MIS-APPLIED MINN. STAT. § 541.051, SUBD. 1, WHICH PROVIDES THAT A CAUSE OF ACTION ACCRUES UPON DISCOVERY OF AN *INJURY ARISING OUT OF A DEFECTIVE AND UNSAFE CONDITION.* THE CAUSE OF ACTION DOES NOT SIMPLY ACCRUE UPON DISCOVERY OF DEFECTS.

In its opinion, the Court stated "it is clear that under this section the statute of limitations began running upon the Association's discovery of *defects* in the Condominium's roof." Supreme Court Opinion, p. 7, emphasis added. However, the standard governing the two-year statute of limitations is whether the Association discovered, or in the exercise of

reasonable diligence should have discovered, an *injury* sufficient to maintain a cause of action. Greenbrier Village Condominium Two Ass'n v. Keller Inv., 409 N.W.2d 519, 524 (Minn.App. 1987); The Rivers v. Richard Schwartz/Neil Weber, Inc., 459 N.W.2d 166 (Minn.App. 1990). The statute was specifically amended in 1988 to reflect that language. Minn. Stat. Ann. 541.051 (1988).

In Greenbrier, the Minnesota Court of Appeals defined the date the Statute of Limitations begins to run on claims brought pursuant to Minnesota Statute § 541.051. The Court stated:

> The alleged negligence (or breach of implied warranty as the case may be) *coupled with* the alleged resulting damage is the gravamen in deciding the date upon which the cause of action at law hereinafter accrues.

Greenbrier Village Condominium Two Ass'n v. Keller Inv., 409 N.W.2d 519, 524 (Minn.App. 1987). Thus, an "injury" has not accrued until both the defective condition and the resulting damage have been (or reasonably should have been) discovered.

The Association, although it had scattered leaks prior to 1989, did not have sufficient leakage to prompt an investigation until the deluge of leaks on the third floor in 1989, which led to the discovery of the roof replacement "injury." Affidavit of Edward O. Betker dated June 1, 1993. See, Lake City Apartments v. Lund-Martin Co., *supra.* (Initial leaks did not constitute discovery of the injury, which was defective plumbing.)

There were no non roof-related defects discovered until 1990. See Affidavit of John R. Dorgan dated February 18, 1994. Therefore, it would have been impossible to allege an injury sufficient to maintain a cause of action for the non roof-

related defects in 1987, since the Association had no hint that such injuries existed. Furthermore, as previously noted, the Greenbrier case clearly allows separate claims for separate injuries where the defects are separate and distinct. Greenbrier, *supra.*

8. THE APPLICATION OF THE COURT'S OPINION TO FUTURE CASES WILL EFFECTIVELY (I) CONFUSE THE ISSUE OF WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN FOR A CAUSE OF ACTION BROUGHT PURSUANT TO MINN. STAT. 541.051 AND (II) PRECLUDE RECOVERY FOR SUBSEQUENT INJURIES SUFFERED BY PLAINTIFFS IN DEFECTIVE CONSTRUCTION CASES.

The Court designated the discovery of a *defect* as the date the statute of limitations begins to run. However, current case law and the statute itself specifically designate the discovery of the *injury* as starting the statute of limitations running. If the Court does not modify, or at the very least, clarify its opinion, the issue of when the statute begins to run will be forever confused. Clearly, with regard to this issue, the Court of Appeals made an effective and sensible argument ruling that the discovery of the *injury* arising out of a defective and unsafe condition is the true date from which the statute of limitations should begin to run. The Court of Appeals stated:

> It would be unsound public policy to impose a stricter rule, requiring a party to investigate all possibilities at the first sign of a problem. The approach of Lake City Apartments is especially compelling here, where, before commencing its lawsuit, the Association took reasonable steps to remedy the problem in an economically sound and

> thrifty fashion, making reasonable assumptions of fact rather than spending large sums to guard against possibilities perceived as remote.

Hyland Hill Co. Condo Ass'n v. Hyland, 538 N.W.2d 479, 484 (Minn. App. 1995).

As discussed in Greenbrier, *supra*, the injury consists of the negligence plus the resulting damage. Prior to April of 1990, the Association could only prove "resulting damage" totalling $20,000. Upon discovery of the subsequent damage resulting from the construction defects after 1990, the Association's monetary damages relating to the roof exceeded $350,000. In its opinion, the Court seems to be stating that the subsequent injuries or "resulting damages" are precluded and that only one injury is allowed for any real property improvement.

In ruling that there was no distinction among construction defects, and therefore no distinction among separate injuries arising out of defective and unsafe construction, the Court is effectively precluding future plaintiffs from bringing claims for subsequent injuries. Future plaintiffs will have to bring a cause of action for each maintenance problem encountered on the off-chance that defective construction exists. Claims brought too early will be dismissed if the plaintiffs have not yet discovered an "injury sufficient to maintain a cause of action". However, if claims are not immediately brought upon discovery of a defect, the statute of limitations may run before the prospective plaintiff is even aware of the injury. As the Court of Appeals noted, this proposition could lead to "both absurd and unjust consequences". Hyland, at 485.

9. **THE FAILURE TO ENFORCE THE JURY'S UNAMBIGUOUS INTENT IN ITS DAMAGE AWARD TO THE ASSOCIATION VIOLATES THE ASSOCIATION'S CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER ARTICLE 1, SECTION 4, OF THE MINNESOTA CONSTITUTION (AMENDED AND RESTRUCTURED NOVEMBER 5, 1974) AND AMENDMENT VII TO THE UNITED STATES CONSTITUTION.**

The Court stated in its opinion:

> The court of appeals decision implies that the jury intended the Association to be awarded the total amount of damages claimed. *However, we are unconcerned with what the jury intended the outcome of the case to be.*

Supreme Court Opinion, p. 14.

The Court clearly erred in its application of the law with regard to this matter. In the case at bar, the Association claimed roof-related damages in the amount of $350,172. As the Court acknowledged, "This is exactly equal to the total amount awarded by the jury for roof defects under the various theories of recovery." Supreme Court Opinion, p. 14. Where the jury's clear intent is to award the amount of claimed damages, and where the aggregate award is supported by the evidence, the integrity of the verdict must not be affected by the jury's apportionment of damages. Capital Bank v. MVB, Inc., 644 So.2d 515, 522 (Fla. Dist. Ct. App. 1994). By ignoring the jury's clear intent to award the Association the full amount of its damages, the Court has violated the Association's State and Federal Constitutional right to a jury trial.

CONCLUSION

For the reasons stated herein, Petitioner, Hyland Hill North Condominium Association, Inc., respectfully requests that the Supreme Court grant this Petition for Rehearing.

Dated: June 17, 1996

Respectfully submitted,

FROMMELT & EIDE, LTD.

By: s/s

John R. Dorgan
Attorney Registration
No. 134557
Frederick R. Krietzman
Attorney License No.
211473
Attorneys for Petitioner
580 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 332-2200

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Hyland Hill North Condominium Association, Inc., a Minnesota non-profit corporation,	
Plaintiff,	
vs.	SPECIAL VERDICT FORM
Hyland Hill Co., a Minnesota partnership, Gittleman Corporation, a Minnesota corporation, Diversified Management Company, a Minnesota corporation, Gittleman Management Corporation, a Minnesota corporation, Melvin C. Gittleman, individually and Donald W. Anderson, individually,	File No. CT 92-13104
Defendants,	
and	
Berwald Roofing Co., Inc., a Minnesota corporation,	
Defendant on Cross-claim.	

We, the jury empaneled and sworn in the above-entitled action, for our verdict, find as follows:

1. Was the condition of the building's roof beyond repair?

ANSWER: Yes ✓ No ____

2. were any of the following parties negligent with respect to the construction and/or design of the building's roof?

ANSWER: Hyland Hill Co. Yes ✓ No_
Berwald Roofing Co., Inc. Yes ✓ No_
Gittleman Management Corporation Yes ✓ No_

3. If you answered "Yes" as to any party or parties in question no. 2, then with respect to those parties answer the following question: Was the negligence a direct cause of harm to the Association?

ANSWER: Hyland Hill Co. Yes ✓ No_
Berwald Roofing Co., Inc. Yes ✓ No_
Gittleman Management Corporation Yes ✓ No_

4. If you answered "Yes" as to any party or parties in both question nos. 2 and 3, then answer the following question: What amount of damages was directly caused by the negligence?

ANSWER: $ 200,000

5. Did any of the following parties breach any express warranties under the Minnesota Uniform Condominium Act with respect to roof?

ANSWER: Hyland Hill Co. Yes ✓ No_
Gittleman Management Corporation Yes ✓ No_
Melvin C. Gittleman Yes ✓ No_
Donald W. Anderson Yes ✓ No_

6. If you answered "Yes" as to any party or parties in question no. 5, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 100,000

7. Did Hyland Hills Co. breach any implied warranties provided for under the Minnesota Uniform Condominium Act with respect to the roof?

ANSWER: Yes ✓ No ____

8. If you answered "Yes" to question no. 7, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 49,000

9. Did Hyland Hill Co. breach any other implied warranties with respect to the building's roof?

ANSWER: Yes ✓ No ____

10. If you answered "Yes" to question no. 9, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 1172

11. If you answered "Yes" as to any party on questions 2 and 3; or 5 and 7; or 7; or 9; then answer this question: Taking the combined negligence of those parties to whom you answered "Yes" as 100%, what percentage thereof do you attribute to:

ANSWER:

Hyland Hill Co.	20 %
Gittleman Management Corporation	20 %
Melvin C. Gittleman	35 %
Donald W. Anderson	5 %
Berwald Roofing Co., Inc.	20 %
	= 100%

12. Was Hyland Hill Co. negligent with respect to construction or design of portions of the building other than the roof?

ANSWER: Yes ✓ No ____

13. If you answered "Yes" to question no. 12, then answer the following question: Was the negligence a direct cause of harm to the Association?

ANSWER: Yes ✓ No ____

14. If you answered "Yes" to both question nos. 12 and 13, then answer the following question: What amount of damages was directly caused by the negligence?

ANSWER: $ 100,000

15. Did any of the following parties breach any express warranties provided for under the Minnesota Uniform Condominium Act concerning portions of the building other than the roof?

ANSWER:

Hyland Hill Co.	Yes ✓ No_
Gittleman Management Corporation	Yes ✓ No_
Melvin C. Gittleman	Yes ✓ No_
Donald W. Anderson	Yes ✓ No_

16. If you answered "Yes" as to any party or parties in question no. 15, then answer the following question: What amount of -damages was directly caused by the breach?

ANSWER: $ 19,287

17. Did Hyland Hill Co. breach any implied warranties provided for under the Minnesota Uniform Condominium Act concerning portions of the building other than the roof?

ANSWER: Yes ✓ No ____

18. If you answered "Yes" to question no. 17, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 18,000

19. Did Hyland Hill Co. breach any other implied warranties concerning portions of the building other than the roof?

ANSWER: Yes ✓ No ____

20. If you answered "Yes" to question no. 19, then answer the following question: What amount of damages was directly caused by the breach?

ANSWER: $ 1000

21. Did Berwald Roofing Co., Inc. breach a contract with Hyland Hill Co. regarding the construction of the roof?

ANSWER: Yes ✓ No ____

22. If you answered "yes" to question no. 21, then answer this question: What amount of damages was directly caused by the breach?

ANSWER: $ 40,000

23. Did any of the following parties breach an obligation to create and fund a reserve account?

ANSWER:	Hyland Hill Co.	Yes ✓ No_
	Gittleman Management Corporation	Yes ✓ No_
	Melvin C. Gittleman	Yes ✓ No_
	Donald W. Anderson	Yes ✓ No_

24. If you answered "yes" as to any party or parties in question no. 23, then answer this question: What amount of damages was directly caused by the breach?

ANSWER: $ 15,000

25. Did any of the following parties breach an obligation regarding payment or collection of maintenance assessments?

ANSWER:	Hyland Hill Co.	Yes ✓ No_
	Gittleman Management Corporation	Yes ✓ No_
	Melvin C. Gittleman	Yes ✓ No_
	Donald W. Anderson	Yes ✓ No_

26. If you answered "Yes" as to any party or parties in question 25, then answer this question: What amount of damages was directly caused by the breach?

ANSWER: $ 4802

27(a)(i) After October 6, 1987, did any of the defendants, other than Berwald, make any promises, inducements, representations, or concealments to the Association that the defects in the building had been or would be cured?

ANSWER: Yes _____ No ✓

(ii) If you answered "Yes" to question 27(a)(i), then answer the following question: Did the Association rely on such promises, inducements, representations, or concealments in commencing this lawsuit?

ANSWER: Yes _____ No _____

(iii) If you answered "Yes" to question no. 27(a)(ii), then answer the following question: on what date did such reliance begin?

ANSWER: _____

(iv) If you answered "Yes" to question no. 27(a)(iii), then answer the following question: on what date Did the Association know, or reasonably should have known that further reliance was unjustifiable?

ANSWER: _____

(v) If you answered "Yes" to question no. 27(a)(iv), then answer the following question:

Did the Association act with due diligence in bringing this lawsuit after it knew or reasonably should have known that further reliance was unjustifiable?

ANSWER: Yes _____ No _____

27(b)(i) After October 6, 1987, did any of the defendants, other than Berwald, fraudulently conceal from the Association the existence of defects in the building by representing to the Association that the defendants had cured the defects?

ANSWER: Yes _____ No ✓

(ii) If you answered "Yes" to question no. 27 (b) (i), then answer the following question: Did the defendants know at the time the representations was made that the defects in the building had not in fact been cured?

ANSWER: Yes _____ No _____

(iii) If you answered "Yes" to question no. 27(b)(i), then answer the following question: On what date did the representations begin?

ANSWER: _____

(iv) If you answered "Yes" to question no. 27(b)(i), then answer the following question: On what date did the Association know, or reasonably should have known that the defendants, representations were false?

ANSWER: _____

This verdict was agreed to at the hour of 9:45 o'clock A.M on MAY, 17, 1994.

s/Henry G. Egan, Jr.
Foreperson

If a 7/8th verdict all jurors concurring in the verdict must sign below.

_____ _____

_____ _____

_____ _____

_____

Filed in open Court on _____ at _____ A.M./P.M.

_____
Court Deputy

right on time. Thank you so much.

(The jury panel returned to the courtroom.)

THE COURT: Good morning, ladies and gentlemen of the jury and attorneys and parties. First, I want to apologize for any -- you might have been happy that you had the afternoon off yesterday, I don't know. As the morning goes on, you'll realize when I do read the instructions to you and you do get the verdict form, the amount of work that has gone into preparations today. So I want you to know that we were working, and we did work all day yesterday so we could proceed here correctly.

What we're going to do, as I promised, is proceed in a minute with the closing arguments and then my instructions to you and you can begin your deliberations. However, before we begin, I have some stipulations to read into the record, and these are stipulations and facts that have been agreed to by the parties.

Defendant Gittleman Management Corporation is the successor corporation to defendants Gittleman Corporation and Diversified Management Company. Any reference to Gittleman Management Corporation should be construed as also including Gittleman Corporation and Diversified Management Company. That will be clear when you look at the caption of the case that will be on the verdict form which I'll read to you later, and that will give you some idea about the parties here.

As of August 31, 1990, the Association had a balance of $25,080.95 in its reserve fund account.

Prior to August 31, 1990, the Association's budget allocated the amount of $6,000 per year for the Association's reserve fund.

At the present time the Association's budget allocates $13,000 per year for the Association's reserve fund.

The Association has paid to Bernard L. Dalsin Company a total of $317,616 for the following services performed by Dalsin: Inspection of original roof structure, tear-off of original roof, and installation of a new roof.

The Association has paid to Inspect Inc., a total of $32,556 through October 31, 1991, for the following work: Inspection of roof leaks, laboratory analysis of the original roof structure, site inspection, preparation of reports regarding re-roofing progress by Bernard L. Dalsin Company, inspection of re-roofing by Bernard L. Dalsin Company, and preparation of re-roofing materials, including specifications and bidding documents.

The Association has paid to Omega Construction a total of $4,904.79 through October 29, 1992 for the repairs of porches at the Condominium.

The Association has paid to Dr. Ladislav Cerny the total of $3,567 through December 1992 for his services concerning inspections of the masonry facade and other portions of the Condominium, and generating reports concerning said investigations.

The Association has paid to Carciofini Caulking Company a total of $1,718 for repairs performed by Carciofini on patios at the Condominium.

The Association has paid to Brin-Northwestern Glass Company a total of $3,309.73 through August 25, 1994 for repairs to patios at the Condominium.

The Association has paid to Wilson Services a total of $7,798 through April 25, 1994, for repairs to patios at the Condominium.

And, finally, the Association has paid to VHM Services a total of $1,306.83 for various repairs for water leakage at the Condominium.

And now that the record here is complete, I will move to the closing arguments, and I'll ask Mr. Cox if you're prepared to proceed.

MR. COX: I am.

May it please the Court, counsel, members of the

Corporation. Hyland Hill Co. does not have to pay that amount (indicating).

Let's talk about construction amounts. You heard some of the amounts that Judge Rosenbaum read to you this morning, and those are costs that are stipulated. So the actual amounts are not questioned. And here's those amounts. For the roof, the Association has paid a total of $350,172 (indicating). Now, for non-roof defects, the amounts that there is no question the Association is already paid is $22,604.35 (indicating). For other non-roof defects, these are the amounts that were brought into the record through testimony or are in exhibits, and here they are. The Wilson Services. It's the three-season porch work that has to be done to do the flashing and the other work under the doors. That's $50,800 (indicating), 16 more units. They have done three units. Now, you heard Mr. Wilson testify that they had tried everything in the world to try to repair these units, Mr. Scheuing also. They caulked and caulked and caulked around the unit that had water leakage and nothing worked. They finally had to take out the door, get underneath the sill where there was no flashing and there was rotted wood, get flashing in there so that the wood wouldn't rot anymore, and run the flashing down so that it was a complete set of flashing rather than the flashing that went up only to the front of the door. That's the work they had to do to correct these doors. And for the defendants' expert to say that all you need out there is some caulking is ridiculous. They tried it. It doesn't work. You can caulk a screw and, sure, maybe water won't get into the screw head. What are they asking? The 58 unit owners out here, most of who are retired, are supposed to get on their knees every week to determine whether or not these screw heads are caulked? Not only that, but that doesn't stop the water from getting in through the brick underneath or any other entry point.

This Maertens-Brenny is the expansion joint work, the $35,500 (indicating). Now, the defendants failed to put any expansion joints out there, and expansion joints were called for in the plans. But to say expansion joints aren't necessary and to have their expert say you don't need expansion joints in this building is again irresponsible when they were called for and specified in the plans themselves. You heard Professor Cerny talk about the pressure that's out there already and is going to increase. You heard him talk about the sill on the the door, when they took it out, it just bowed from the pressure that's being put on these windows and doors because of the expansion of the brick and the contraction of the wood. Saying expansion joint aren't necessary to correct the problem is again irresponsible.

Brin Northwestern is the glass company that's being used to do remove the doors so the work can be done and then replacing the doors. And that's a thousand dollars a unit, so that that's $16,000 (indicating).

And tuckpointing work. We'll, it's $13,383 (indicating). The column on the left shows the exhibits that contain these numbers in case you'd like to look more at the estimates or at the numbers themselves. In any event, the stipulated non-roof damages of $22,604.35 (indicating), and the non-stipulated damages of $115.683.75 (indicating).

Now, Mr. Cox talked to you about a form that you're going to be receiving called a special verdict form. On that special verdict form he read some questions you're going to have to answer. The first one being, "Was the condition of the building's roof beyond repair?" Well, to suggest that Inspec for some reason, a well respected firm, not only in the community, but in the United States, would come in and recommend a roof had to be replaced so they could get a minor commission of around -- the mid 20's was their payment on this roof -- is again absolutely irresponsible. You might note, if you

concealment or knowledge should have been known to the defendants. They were the ones that designed this poor minimal, poorly designed roof and poorly designed building and the areas around it. They should have known that more care was necessary to either prevent this from happening or this roof should never have been put on in the first place. And that's their problem. They should have done it at the time. The Association had no control over that. So the Association should not suffer because of what they did.

I'm showing you what is a final damage summary which contains the totals of the numbers that we were talking about earlier. We got the rough number of $350,172 (indicating). There is no doubt that cost was made; the Association paid that. That's a stipulated cost. The non-roof defects, $138,278.10 (indicating). As we discussed, part that of that has been stipulated to. The other amounts or portion of that total is contained in some of the exhibits that I referred to on the diagram. The fiduciary duty claim $80,865.62 (indicating). For a total of $569,315.82 (indicating).

I might point out there are several claims that we're not are making any concrete request for damages for. You heard Mr. Lais of Omega Construction, who did the work on the sundecks, testify that he had done the